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No. 01-521

In the Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, *et al.*,
Petitioners,

v.

VERNA KELLY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF MINNESOTA STATE REPRESENTATIVE PHILIP KRINKIE AND EIGHTEEN OTHER SIMILARLY SITUATED STATE LEGISLATORS* AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

RAYMOND C. ORTMAN, JR.
Counsel of Record
JULIANNE E. ORTMAN
15600 Wayzata Boulevard
Suite 208
Minnetonka, MN 55391
(952) 476-2640
Attorneys for Amici Curiae

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*Complete list of sponsoring legislators appears on inside cover

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INTEREST OF THE AMICI CURIAE

As members of the Minnesota State Legislature (15 from the Minnesota House of Representatives and 4 from the Minnesota Senate), Legislators come before this honorable Court to present their view, from the legislative branch of our State, of the paramount importance of free and open judicial elections to Minnesota's system of state government. Indeed, because Minnesota's constitutional requirement for judicial elections differs so radically from the federal constitutional provision for appointment and life tenure for judges, Legislators' perspective may be of particular assistance to this

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no one other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

Court. Although Minnesota's constitutional mechanism for selecting judges may be different from the Federal model, it is no less worthy of respect by the federal courts, including a keen attentiveness to the fundamentally different public policy interests presented by an electoral process versus an appointment process.

In the view of the *amici*, an election can only be legitimate if the People – who in their sovereign capacity ordained and established our state Constitution – are given meaningful and unfettered access to the views of all candidates for election. Indeed, *amici* submit that the right of the People to vote necessarily includes the right of the People to vote wisely and with full access to the views of the candidates, *especially* their views concerning disputed legal and political issues. Each of the *amici* can attest from his or her own experience as elected legislators that the free flow of ideas is imperative during an election contest. *Amici* have a strong interest in ensuring that all branches of Minnesota's state government remain equally accountable to the People through the constitutionally-mandated electoral process. In recognition of their sworn duty to support and defend the constitution and laws of the United States and of the State of Minnesota, and in recognition of the importance of the question presented in this case to our State, *amici* offer their support for Petitioners' position.

SUMMARY OF ARGUMENT

The Minnesota Constitution expressly provides for the direct election of judges by the People. The framers of our State constitution were well aware that the electoral process for judges would present political issues. But our constitutional framers and our People embraced both the advantages and disadvantages of their decision in order to advance what they deemed to be the greater good: namely, that judges should be directly accountable to the People they govern.

The State has no compelling interest in limiting the First Amendment rights of judicial candidates. To the contrary, the State has every interest in protecting the public's constitutional right to elect judges, and to ensure that votes for judicial candidates are cast with knowledge and not in ignorance. Even more important than the candidates' right to speak is the *public's right to hear* the speech in evaluating judicial candidates. The People can and must be trusted to choose wisely, and to determine for themselves the importance of "impartiality" in the greater scheme of electing a quality judiciary. The People have reserved this right to themselves, and they have not consented to any other manner for the selection of judges.

The restrictions imposed by Canon 5 are a direct assault upon the prerogative of the Legislature to make laws, including laws concerning the conduct of elections. In its drive to insulate incumbent judges from political pressures, under the guise of an exercise of its inherent judicial power, the judiciary upsets our constitutional system of checks and balances, and unfairly favors incumbents over challengers. This absence of viewpoint neutrality is fatal under First Amendment scrutiny.

The regulation of judicial elections in the form of Canon 5 is a restriction adopted by the Respondents to regulate elections for *political* offices. The judiciary's purported self-regulation in this instance restricting free speech in judicial contests is a conflict of interest – self-servingly harboring incumbent judges from the rigors of political campaigns. But the restriction is even more insidious as an invasion of the public's sovereign right to hold accountable the judges they elect to govern them. The public's right of scrutiny and review of judges does not operate as a limitation upon Respondents' responsibilities of oversight and management of judges. Rather, judicial elections function as an additional, but separate, manner of direct review by the People.

ARGUMENT

I. THE PEOPLE OF MINNESOTA HAVE MANDATED THE ELECTION OF JUDGES TO ENSURE THAT THEIR JUDGES SHALL BE DIRECTLY ACCOUNTABLE TO THEM.

A. The People Of Minnesota Chose Direct Election Of Judges With Full Knowledge That Those Elections, Like All Others, Would Present Political Issues.

Article VI, Section 7 of the Constitution of the State of Minnesota (1974) provides as follows (emphasis added):

> "The term of office of all judges shall be six years and until their successors are qualified. They shall be *elected by the voters* from the area which they are to serve *in the manner provided by law.*"

From Minnesota's admission into the Union in 1858, its state constitution has always provided for the direct election of all judges by the People of Minnesota. The debates of the twin Constitutional Conventions confirm that the constitutional provision for direct election of judges was a deliberate departure from the Federal model, and that it was made with full knowledge that an electoral process would subject judges to political considerations.

The Republican Constitutional Convention embraced direct election of judges with very little debate. It is clear from these proceedings, however, that the Convention delegates were well aware that political and partisan issues might intrude into judicial election campaigns, but this knowledge did not dissuade them from requiring election of judges. In fact, the Convention defeated a modest amendment offered by Thos. Galbraith that merely would have provided for the election of judges on a different day from that for the election of legislators and other

constitutional officers. The stated rationale for Mr. Galbraith's amendment was "that the excitement of mere political and party issues should be kept as far as possible from the election of judges." Debates and Proceedings of the Constitutional Convention for the Territory of Minnesota (August 8, 1857), 406 (T. Andrews reporter 1858) (hereinafter, "Republican Convention Debates"). But delegate Charles Lowe did not agree that the amendment would be "beneficial" or that it would "be possible to separate the election of judges from political considerations. . . ." *Id.* The amendment was quickly defeated. *Id.* at 407.

Moreover, the delegates were well aware that party politics might well play a role in judicial decision making. In the context of a debate concerning whether the franchise should be limited to white men only and concerning this Court's infamous decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), Republican delegate Chas. McClure predicted that Democratic judges would feel themselves bound by the *Dred Scott* decision "because it would be carrying out the views of their party," but that Republicans might take a different view. Republican Convention Debates at 378 (August 7, 1857).

The Democratic Constitutional Convention was somewhat more contentious, but the result was the same. Initially, the report of the Committee on the Judiciary for the Democratic Convention in 1857 proposed a compromise between factions favoring appointment of judges and election of judges. The compromise position called for the direct election of inferior judges and nomination of Supreme Court judges by the Governor. But the Convention cast aside this compromise and adopted an amendment offered by delegate Lafayette Emmett requiring the direct election of supreme court judges as well. *See* Debates and Proceedings of the Minnesota Constitutional Convention (August 14, 1957), 493-509 (F. Smith reporter, 1857) (hereinafter, "Democratic Convention Debates").

In offering his amendment, Mr. Emmett – who was then the Attorney General of the Minnesota Territory[2] – explained (Democratic Convention Debates at 494):

> "I think that the great principle of an elective Judiciary will meet the hearty concurrence of the people of this State, and that it will be entirely unsafe to go before any people in this enlightened age with a Constitution which denies to them the right to elect all the officers by whom they are to be governed."

Mr. Charles E. Flandrau supported the amendment, among others, stressing the lofty Democratic ideal of "the people being able to govern themselves." *Id.* at 495.

Typical of those opposed to the election of judges were the remarks of delegate B. B. Meeker, who bemoaned the fact that if judges "are to be elected, [they] must necessarily be essentially political Judges; they cannot be anything else." Unrelenting in his campaign for a supposedly independent Judiciary, Mr. Meeker offered an amendment of his own, after Mr. Emmett's amendment was agreed to, that would have lengthened the term of supreme court judges to 10 years and would have made them ineligible for reelection, "so that they shall never be influenced by any motives concerning their reelection by the people." *Id.* at 509. But that amendment was defeated. *Id.* at 511.

The views of Mr. Emmett and the majority prevailed at the Constitutional Convention, and the direct election of all judges was agreed to. The cry of the now familiar opposition for an "independent judiciary" – apparently meaning an appointed rather than an elected judiciary – was overcome by these prescient remarks by Mr. Emmett (*id.* at 503):

> "We hear a great deal of talk about an independent Judiciary. The phrase is in everybody's mouth. What does it mean? Independent of whom? Independent of what? Independent of the people?... I say that in order to correct the errors of Judges – and it may be important to correct them, – the office should be made elective."

[2] W. Foster & M. Anderson, eds., *For The Record, 150 Years of Law & Lawyers in Minnesota*, 321 (Minn. State Bar Assn. 1999).

One year later, Lafayette Emmett became our State's first chief justice. *For the Record*, 321.

For the Constitutional Convention, the question of direct election of judges was fundamentally a question of trust. Could the people be trusted to elect their judges directly, to sift and determine issues of judicial competence and impartiality (among others) for themselves? Our constitutional framers said yes. Mr. Emmett expressed Minnesota's abiding trust in its People to determine their own course with these words: "if the people are incapable of selecting their Judges, they are also incapable of selecting the man who is to appoint the Judges." Democratic Convention Debates at 503.

B. Minnesota's History Of Judicial Elections Demonstrates That Judicial Offices Were Designed To Be Political Offices.

The constitutional requirement of election of judges has never been repealed, but rather has been amended to increase – not decrease – the accountability of Minnesota's judges. In this regard, the term of supreme court judges initially was seven years, but the Constitution later was amended to provide for a six-year term. Moreover, the length of time between an appointment to fill a judicial vacancy and subsequent election of a successor was increased from 30 days to one year in order to give sufficient time "to allow the public to reflect favorably or unfavorably on a judge's competence in office," while still "retaining ultimate control of the judiciary in the hands of the voting public." *Peterson v. Stafford*, 490 N.W.2d 418, 423 (Minn. 1992) (citing

Judicial Branch Committee Report, Minnesota Constitutional Study Commission (1972)).[3]

The "nonpartisan" designation for judicial elections referred to by the Court of Appeals below (247 F.3d at 857) was not a *constitutional* change regarding judicial elections. Rather, the "nonpartisan" designation was part of a broader legislative initiative to make virtually all political offices "nonpartisan" - - because of the political pressures of Prohibition:

> Party designation was dropped in 1913 largely as the result of a parliamentary struggle between the "drys" and the "wets" in which the opponents of prohibition working with liquor interests exploited sentiments within the legislature that were strongly critical of party machines and boss control. One must remember that this was the era of progressivism, when parties were disdained and political independence was extolled, and when it was hoped that direct political action by the people (through means such as initiative, referendum, recall, and direct primary) would lead to more responsible government.

G. Theodore Mitan, *Politics in Minnesota* 57 (Univ. of Minn. Press 1960).

Because of this pendulum in politics, all city, county, legislative and judicial offices in Minnesota were designated non-partisan, by legislative enactment. In 1913, the state legislature enacted a statute providing (1913 Minn. Laws ch. 389, § 182) that:

[3] *See also* Report of the Constitutional Commission of Minnesota, 45 (1948) (recommending increase in time between appointment and appointee's subsequent candidacy to "give sufficient time to enable observation of the competence developed by the appointee prior to the election").

> ". . . the names of all candidates for nomination for the office of chief justice, associate justice of the supreme court, judges of the district court, probate and municipal courts and all members of the state legislature, and all elective county officers, and all municipal offices in cities of the first and second class, shall be placed upon a separate primary ballot hereinafter designated as "non-partisan primary ballot.
>
> * * * *
>
> The two candidates for nomination for every such non-partisan office who shall receive the highest number of votes, ascertained as provided by this act, shall be declared the nominees and their names shall be placed upon the election ballot, without party designation. . . ."

All city, county, legislative, and judicial offices remained non-partisan in Minnesota until 1973, when the legislature amended this section only by striking six words, "all members of the state legislature," from the renumbered section. See 1973 Minn. Laws ch. 3 § 202.03. The non-partisan designation was repealed as to legislators in 1973, but still applies to county commissioners and other local office holders, as well as to our judges.

For sixty years, most political offices in Minnesota were nonpartisan. Yet, it is impossible to believe that all of the candidates for these offices over these many years refrained from discussing the issues and controversies of their day. Nor is it possible to believe that the state ever had a legitimate interest, and even less a compelling interest, in restricting their right to do so. No one would even think of arguing that such a designation prohibited free speech by legislative candidates or candidates for county or local elected office. *See Moon v. Halverson*, 206 Minn. 331, 288 N.W. 579 (1939) (non-partisan statute directed merely at filing procedures and ballot designations). Accordingly, the "nonpartisan" label still applicable to candidates for judicial office and county

and local elective offices cannot be read to support restrictions on the speech of candidates for those offices.

C. The Electoral Process Requires That The People Be Trusted To Make Their Own Decisions Based Upon More Speech, Not Less.

It is not in the State's best interest to restrict the speech of any candidate that is running for elected office. Our State is its People, not the current members of the Minnesota bench, or the Minnesota State Bar Association ("MSBA"). Our Supreme Court is an institution to be honored when it acts honorably, and the lawyers in our state are worthy of respect when they concern themselves with finding the truth and serving the interests of justice. However, neither our Supreme Court, nor the MSBA may legitimately claim exclusive authority to articulate the best interests of the State of Minnesota.

To the contrary, in our democracy the People have a vested interest in obtaining as much information as possible in order to cast an informed vote, including all of the information that candidates believe important for an evaluation of their candidacy. Indeed, this Court repeatedly has observed that:

> "there is practically universal agreement that a major purpose of that [First] Amendment was to protect the free discussion of governmental affairs . . . [and] it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."

Brown v. Hartlage, 456 U.S. 45, 52-53 (1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218-219 (1966) and *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-272 (1971)).

That Minnesota's elected judges hold *political* office is by constitutional design. Many of our State's first judicial

races were partisan, with political party nominations. *See For the Record*, 321-323. In fact, from 1858 to 1913, many of our State's Chief Justices had been nominated by one, and sometimes two, political parties. *Id.* Clearly, our judicial offices were intended by our constitutional framers to be political offices, as evidenced by our early citizens' words, actions, and subsequent conduct. Judicial elections, like any other elections, thus are entitled to the same constitutional guarantee of free speech as enunciated by the Court in *Brown v. Hartlage*.

In its book, *For The Record, supra* at 170, the MSBA presented an overview of our State's district court system, which logically may be expanded to include our state's entire judicial branch:

> There are three major objectives of the district court system: (1) to provide impartial decisions of the highest quality possible; (2) to ensure that justice is timely and uniformly applied; and (3) to encourage respect of the law and the administration of justice.

As Legislators, *amici* agree in theory with this basic assessment of the objectives for our judiciary. But *amici* disagree with the position that is argued by Respondents that the objective of impartiality should be the paramount concern, to the detriment of all other concerns, when it comes to the election of our judges. Legislators also dispute the hidden premise in Respondents' argument that the People cannot be trusted to determine for themselves whether a particular judicial candidate can be impartial, or to weigh this concern against other values. Quality decisions, uniformity of decisions, and respect for the law and justice certainly are of no less consequence than impartiality. Nor can Legislators agree that impartiality should be paramount to federal and state constitutional protections for the rights of free speech.

Amici trust that members of the electorate are wise enough to evaluate the impartiality of judges (given meaningful opportunity to review the decisions and views of

judicial candidates), as well as to evaluate such additional concerns as quality and uniformity of decision, judicial philosophy and judicial temperament. And *amici* trust the People to determine for themselves, based upon all of the information, the weight to be accorded to each of these objectives when casting their ballots. Justice Brandeis once observed "public discussion is a political duty" in our country." *Whitney v. California*, 274 U.S. 357, 375 (1927) (concurring opinion). And as this Court affirmed in *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976) (per curiam), Justice Brandeis' observation "applies with special force to candidates for public office."

The framers of our state constitution had the option and example before them of the federal court, where judges are appointed for a life tenure. Minnesota's constitutional framers rejected that option in favor of elections -- so as to ensure direct accountability of judges to the people. That is not to say that Minnesota's way necessarily is better than the federal system, but it is different and it must be respected by this Court without importing *sub silentio* the rationale for the competing system of appointed judges as the paramount virtue.

Nothing short of a constitutional amendment should be required to limit the People's right to meaningfully select their judges. Minnesota's constitution requires judges to be directly accountable to the electorate. Legislators believe that any restriction upon the People's constitutional prerogative to select judges is a violation of the Minnesota state constitution – whether or not the "regulation" has been adopted by the state's Supreme Court, endorsed by the state's bar association, or advocated by any other group now before this Court. "The critical right at stake here is the right of the *public* to hear the candidates messages, not simply the rights of the *candidates* to express themselves." Note, *A Constitutional Alternative to the ABA's Gag Rules on Judicial Campaign Speech*, 73 Tex. L. Rev. 606 (Feb. 1995). This argument, that the public's right to know is even more critical than the candidates' right to speak, is based upon the rationale

of self-governance, which forms the very basis of our governmental authority (judicial, executive, and legislative). *Id.*

Minnesota's current Supreme Court Chief Justice, held in high regard throughout our State, has made comments that support the case for more meaningful elections. Chief Justice Kathleen Blatz has reported that "[s]urvey after survey confirms that a large segment of the public does not understand or appreciate in a meaningful way the protections the judicial system provides, the role it fulfills, and the contributions it makes to the common good." Chief Justice Kathleen Blatz, "The State of the Judiciary," Address to the Minnesota State Bar Association, June 25, 1998, reprinted in *Bench & Bar*, October 1998, 43, 46. Chief Justice Blatz further remarked that the "level of public trust and confidence is the ultimate measure of our courts' performance and thus these survey results are of serious concern. . . ." *Id.*

As Legislators, *amici* believe that prohibiting candidates from discussing, responding to questions, and offering opinions regarding controversial issues only perpetuates this lack of trust and confidence recognized in the surveys cited by Chief Justice Blatz. It is nothing more than hollow and artful argument to claim that the public's right to participate in elections is secure without the candidates' complimentary right to speak regarding issues and controversies in our courts. On what basis shall an intelligent voter evaluate and select a candidate for public office?

Respondents' position cavalierly dismisses the public's paramount interest in meaningful participation in judicial elections with the unmistakably patronizing premise that the public cannot be trusted to select qualified and quality individuals to serve in the judiciary. Legislators reject that premise. Minnesota has a very concerned and committed electorate. In fact, Minnesota has one of the highest percentages of qualified voter turnout nationwide; the Minnesota Secretary of State's Office reports that in the 2000 general election we had 3,547,000 eligible voters, of which 2,458,303 actually voted – a nearly 70% voter participation

rate. *See* Minnesota Secretary of State Elections Website, Election Statistics and History: www.sos.state.mn.us/election/result.html (Jan. 14, 2002).

The strength of our government lies in the wisdom of its people. By promulgating Canon 5's restrictions upon the speech of candidates for judicial office, Minnesota's judiciary has lost faith in the wisdom of the People to decide among all candidates for themselves. And in attempting to protect the People from themselves, that same judiciary has subtly but perniciously undercut the People's constitutional prerogative to elect their judges. This violence to our State constitutional system of governance cannot support the Court of Appeals' finding that Canon 5 is justified by a compelling "governmental interest in an independent and impartial judiciary." *Republican Party of Minnesota v. Kelly*, 247 F.3d 854, 867 (8th Cir.), *cert. granted*, __U.S.__ (2001).

Quite to the contrary, *amici* submit that the People of Minnesota have a compelling state interest in more speech, rather than less, from all of their candidates for elective office, including judicial candidates. This compelling interest is to be found not only in the State constitutional provision for direct election of judges by the People, but also in the state and federal guarantees of free speech. *See* Minn. Const., art. I, § 3; U.S. Const., amends. I, XIV; *accord Brown v. Hartlage*, 456 U.S. at 53 ("[t]he political candidate does not lose the protection of the First Amendment when he declares himself for public office").

D. To The Extent Judges Make Public Policy, They Should Be Subjected To More Scrutiny In An Election, Not Less.

All concede that our judges participate in governing the people. For their participation they are accountable by those governed in their courtrooms. "Judges are active participants in the daily process of governing the American people; therefore the people have a right to know how a judicial candidate plans to conduct him or herself if she is selected to

fill the office." Note, *A Constitutional Alternative to the ABA's Gag Rules on Judicial Campaign Speech*, 73 Tex. L. Rev. 597, 613 (Feb. 1995).

Accountability to the public is even more critical given the inescapable, although controversial, theory that judges actually make law. "Lawmaking is the inevitable process of an active, powerful judiciary that is exercising its constitutional power." *Id.*, at 611. Minnesota Chief Justice Blatz has describe well the role of judicial activism within the current dynamics of cases in our courtrooms (*Bench & Bar, supra,* at 44):

> "People look to the criminal justice system today to handle issues that individuals, families, communities, and societal institutions used to handle. Children out of control, aging parents whose health situations raise heartrending questions of biomedical ethics, complicated social interactions, and substance abuse which underlies huge percentages of our cases – these were not perceptible issues just a generation ago, but are commonplace in courtrooms throughout Minnesota every day."

Further, in recent years, our Supreme Court has handed down decisions that clearly announce new rights and protections, and articulate new legal and public policy standards. *See, e.g., State v. Tenerelli*, 598 N.W.2d 668 (Minn. 1999) (requiring criminal defendant to pay for shawman ceremony sacrificing chicken and cleansing soul is not religious and does not violate separation of church and state), *reh'g denied*, 1999 Minn. LEXIS 600 (Sept. 2, 1999), *cert. denied*, 528 U.S. 1165 (2000); *State v. Russell*, 477 N.W.2d 886, 888-889 (Minn. 1991) (announcing that Minnesota's equal protection clause is no longer co-equal with federal constitution's equal protection clause, but "different and more stringent"); *Doe v. Gomez*, 542 N.W.2d 17 (Minn. 1995) (finding state constitutional right to state-funded abortion).

Our judges routinely resolve social issues and attempt to find rough justice where statutory and legal authority may not exist. By doing so they also establish public policy – conduct which is inherently legislative, and not judicial – and challenge the separation of powers along the way. Yet while our judges purport to represent the public, and make policy decisions on their behalf, they have avoided meaningful scrutiny by the voters regarding their performance.

II. CANON 5 IS AN UNWARRANTED INTRUSION UPON THE PREROGATIVES OF THE LEGISLATIVE BRANCH.

At issue in this case is whether Canon 5 of the Minnesota Code of Judicial Conduct, which is applicable to attorney candidates for judicial office through Rule 8.2(b) of the Minnesota Rules of Professional Conduct, violates the Constitutional right to freedom of speech under U.S. Const. amends. I, XIV.

Under the guise of regulating judicial conduct, Canon 5 unlawfully intrudes upon the constitutional prerogatives of the legislature to enact laws, specifically to make laws concerning the conduct of judicial elections. *See* Minn. Const. art. IV, § 22; Minn. Const. art. VI, § 7. Running for office – even a judicial office – is not a judicial act. It is a political act beyond the power of the judiciary to regulate.

Election contests do not take place in courthouses before judges; they take place in the whole public arena before the whole People of the State. A lawyer candidate for a judicial office is not participating in the administration of justice – which the courts may regulate[4] – but rather is participating in the democratic process itself, which only the People or the Legislature may regulate. Moreover, to the extent that

[4] *See, e.g., In re: Disbarment of Tracy*, 197 Minn. 35, 44 (1936) (finding inherent judicial power to discipline attorneys). The strictures of Canon 5 are made applicable to attorney candidates for judicial office by means of Rule 8.2(b) of the Minnesota Rules of Professional Conduct.

limitations upon the speech of judicial candidates purport to rely upon an exercise of inherent judicial power, such limitations are particularly odious because they would seem to avoid the possibility of any review by the legislative or executive department, thereby overturning the constitutional system of checks and balances. The judicial branch has a clear conflict of interest in promulgating restrictions upon the speech of judicial candidates. Such restrictions not only trample the prerogatives of the Legislature, but also offend sound principles of electoral neutrality that *amici*, as Legislators, strive to defend. The restrictions are *not* neutral as to viewpoint, as the Court of Appeals determined. 247 F.3d at 863. To the contrary, *incumbent* judges are permitted to speak on disputed issues through their opinions; the same opportunity is not available to non-incumbent challengers, however. This imbalance unfairly tends to favor the election of incumbents over their challengers, and fairly raises the question whether Canon 5 is merely a device to favor the retention of incumbent judges. In any event, the absence of viewpoint neutrality is fatal under First Amendment scrutiny. *See Burson v. Freeman*, 504 U.S. 191, 197 (1992); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387-90 (1992) (content discrimination is evidence that "official suppression of ideas is afoot").

As Legislators, we believe that the People are sovereign: "[t]he *only* power the government has is delegated from the people themselves." 73 Tex. L. Rev. at 615 (emphasis added). In Lockean Theory, the legitimacy of the decisions made by our judiciary, like all exercises of governmental authority, rests entirely upon the consent of the governed. *Id.* at 615 (citing J. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under The Lockean Constitution,* 52 U. Pitt. L. Rev. 189, 192 (1990). The sovereign People of our State have mandated that the People will select our judges, and they have never consented to any restriction of this sovereign power.

CONCLUSION

Wherefore the Legislators Amici Curiae pray that the decision of the Court of Appeals upholding the constitutionality of the "announce" clause of Canon 5 be reversed in all respects, and that said clause be invalidated as contrary to the rights secured to the People by the First and Fourteenth Amendments.

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Respectfully submitted,

Raymond C. Ortman, Jr.
Counsel of Record
Julianne E. Ortman
15600 Wayzata Boulevard
Suite 208
Minnetonka, MN 55391
(952) 476-2640

ATTORNEYS FOR *AMICI CURIAE*
MINNESOTA STATE
REPRESENTATIVE
PHILIP KRINKIE, *ET AL.*